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IN THE

Supreme Court of the United States

October Term, 1949.

No.....

THOMAS B. MORGAN,

Petitioner,

vs.

C. B. HORRALL, Chief of Police of the City of Los Angeles, County of Los Angeles, State of California,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner, Thomas B. Morgan, was arrested in the City of Los Angeles and is now in the custody of the Chief of Police of the City of Los Angeles, upon a warrant issued by the Governor of the State of California authorizing the removal of said petitioner to the State of Colorado for trial upon criminal charges filed against him in the courts of the State of Colorado [R. 44-45].

The said warrant was issued by the Governor of California upon a demand by the Governor of Colorado for surrender of said petitioner for the purpose of criminal prosecution in the State of Colorado. The Governor of California, in issuing said warrant, had before him a copy of the complaint and information charging the said petitioner with the criminal offense of conspiracy to commit grand larceny [R. 53]; a copy of the warrant of arrest issued by a magistrate of the State of Colorado [R. 55]; an application for requisition to the Governor of Colorado [R. 50]; the requisition of the Governor of Colorado to the Governor of California [R. 49]; the affidavit of principal complaining witness as to the commission of crime [R. 56], and the affidavits of corroborating witnesses to commission of crime [R. 60, 62, 64-86]. The certificates of authentication by the Colorado authorities appear in the record at pages 87 to 91, inclusive. After the arrest of petitioner, an application for a writ of habeas corpus was filed in the District Court of Appeal, in and for the Second District, State of California, Division 2 [R. 3]. Said court rendered an opinion on June 15, 1948, discharging said writ and remanding appellant to custody [R. 4-5]. On June 16, 1948, petitioner filed a petition for the issuance of a writ of habeas corpus in the Supreme Court of the State of California, and on June 21, 1948, said court denied the petition without hearing [R. 4].

Thereafter, a petition for a writ of habeas corpus was filed in the District Court of the United States, Southern District of California, Central Division [R. 2]. Said District Court rendered its decision and order on July 6, 1948, discharging the writ issued [R. 92] and rendered

a written opinion [R. 92-106]. Findings of fact and conclusions of law [R. 107-110] and the judgment [R. 111] of said court were filed July 12, 1948. An appeal from said judgment was taken to the United States Court of Appeals, for the Ninth District, and it is that judgment [R. 168, 177], affirming the lower federal court's decision, which petitioner seeks to have reviewed by this court.

I.

Section 1549.1 of the California Penal Code Is Not Invalid or Repugnant to the Constitution.

Section 1549.1 of the California Penal Code is a part of the Uniform Criminal Extradition Act which has been adopted in more than thirty of the United States. Said section reads as follows:

> "Sec. 1549.1. *Surrender of person not in other state when committing act resulting in crime therein.* The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in section 1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in the demanding State at the time of the commission of the crime and has not fled therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other states."

Section 1548.2 of the California Penal Code, reads as follows:

> "Sec. 1548.2 *Form and requisite allegations of demand: Necessary accompanying documents: Forms: Authentification.* No demand for the extradition of a person charged with crime in another State shall be reconized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

Article IV, clause 2 of Section 2 of the United States Constitution, reads as follows:

> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

The extradition provisions of the Federal Constitution and Federal Statutes relating to extradition are to be liberally construed to effectuate and expedite the administration of justice.

Brewer v. Goff, 138 F. 2d 710.

The Federal Constitution and statutes do not undertake to regulate the extradition of persons who, while outside a state, commit acts which result in a crime in such state.

> "The validity of legislation in aid of the act of Congress concerning extradition is now well established."
>
> *Dennison v. Christian,* 196 U. S. 637.

It has been held that a state may legislate upon a subject of extradition unprovided for because Congress failed to extend Section 5278 of the Revised Statutes, now cited as Title 18, U. S. C., Sec. 3182, to the full limits of constitutional power.

Innes v. Tobin, 240 U. S. 127;

In re Tenner, 20 Cal. 2d 670.

The federal statute on the subject of extradition (18 U. S. C. A., Sec. 662, now cited as Title 18, U. S. C., Sec. 3182) does not purport to cover the entire field of extradition. It mentions only one class of persons—those who flee from the state in which the crime was committed and who are fugitives from justice.

> *In re Morgan,* 86 Cal. App. 2d 217 [R. 5]; 78 Fed. Supp. 756 [R. 98-101].

Section 1549.1, quoted above, does not provide for the extradition of persons who have fled, but does cover per-

sons in an entirely different category—those who commit an act in one state intentionally resulting in a crime in another state. It is clear, therefore, that each statute refers to a subject different and distinct from the other, and that there is no conflict between them. Each is enforceable in its own sphere.

The section of the Uniform Extradition Act providing for extradition of one not in the demanding state at the time of the commission of the crime against its laws, and who had not fled therefrom, was held not to be contrary to the federal constitutional provision of Article IV, Section 2, nor was it held unconstitutional in *Cassis v. Fair,* 29 S. E. 2d 245, 151 A. L. R. 233.

Similar holdings are found in the following cases:

Ennist v. Baden, 28 So. 2d 160 (Fla., 1946);

Ex parte Campbell, 25 N. W. 2d 419 (Neb., 1946);

English v. Matowitz, 72 N. E. 2d 898 (Ohio, 1947);

State ex rel. Gildar v. Kriss, 62 A. 2d 568.

This same provision was held to be a valid exercise of the police power of the state, and within the powers reserved to the state; hence not in conflict with the constitutional provision involved in the case of *Culbertson v. Sweeney,* 44 N. E. 2d 807, 70 Ohio App. 344. (Appeal to State Supreme Court dismissed because no debatable constitutional question involved. 140 Ohio St. 426, 45 N. E. 2d 118.)

The case of *Innes v. Tobin,* 240 U. S. 127, involved the right of the State of Texas to honor the demand of

the Governor of Georgia for a person who had been brought into Texas by extradition from Oregon.

The court in the last named case said, at page 135:

> "No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the (federal) statute, in not making its provisions exactly coterminous with the power granted by the Constitution, did so for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for, not beyond the pale of all law, but subject to the power which then controlled them,—state authority until it was deemed essential by further legislation to govern them exclusively by national authority."

As suggested by the above quoted language, it was not the intention of the framers of the Constitution, or of Congress, to create a situation in which a state could be required to become the asylum for persons who engaged, by means of conspiring with others, in the commission of crimes in other states and there participate in the preparation for or consummation of such crimes.

The question of the constitutionality of Section 1549.1 of the California Penal Code was passed upon by the District Court of Appeal of the State of California and, in legal effect, also by the State Supreme Court. The interpretation by these state courts upholds the validity of said section.

In re Morgan, 86 Cal. App. 2d 217 [R. 5].

II.

The Documents Submitted to the Governor of the State of California Are Sufficient.

The following documents were submitted to the Governor of California:

1. Requisition or demand by the Governor of Colorado [R. 49];
2. Application for requisition [R. 50];
3. Copy of complaint and information, subscribed and sworn to before a magistrate [R. 53];
4. Warrant issued out of the Justice's Court [R. 55];
5. Affidavit of Emma Hoelzle, sworn to before a magistrate [R. 56];
6. Affidavit of Margaret M. Phillips, sworn to before a magistrate [R. 60];
7. Affidavit of Ross L. Hennerman, sworn to before a magistrate [R. 62];
8. Affidavit of Fred Staab, sworn to before a magistrate [R. 64].

Also attached were copies of statements by one Singer [R. 68] and one Aylesworth [R. 73]. Said statements were not submitted as independent affidavits, but were exhibits made part of an affidavit executed before a magistrate.

It also appears that in the demand on file in the office of the Governor of California, the Governor of Colorado certified to the correctness of certain documents [R. 49].

Section 3182, U. S. C., Title 18 (18 U. S. C. A. 662), provides that demand may be made upon the production of a copy of an indictment or an affidavit, charging that a person named has committed a certain offense, certified as authentic by the governor of the demanding state.

Section 1548.2 of the California Penal Code provides that demand may be accompanied by a copy of an indictment, by copy of an information, or by a copy of an affidavit made before a magistrate, together with a copy of a warrant issued thereon, duly certified.

It would appear that by reason of the provisions of Section 1549.1 of the California Penal Code, the provisions above referred to in Section 1548.2 are applicable as a description of the necessary accompanying papers and their certification, although obviously there are certain provisions in Section 1548.2 which do not apply to the demand under Section 1549.1.

The sufficiency of the record depends upon whether there are in the record certified copies of documents necessary to confer jurisdiction upon the Governor of this State, and not upon whether there may be found in the file other papers, which, considered in and of themselves alone, would be insufficient. To state the proposition differently, if there be sufficient papers in the file to confer jurisdiction, the presence of superfluous papers in the file does not destroy the effectiveness of the proper documents.

The complaint in the file is also an affidavit within the meaning of Section 1548.2 of the California Penal Code.

In re Davis, 68 Cal. App. 2d 798, 808.

What has been said above is not to be construed as admission by respondent that the affidavits signed by the various parties, and in particular the affidavit of Fred Staab [R. 64], are not properly a part of the official record which the Governor of California was at liberty to consider in determining the sufficiency of the record accompanying the demand.

The finding that such papers submitted were sufficient, is in accordance with the opinion of the Federal District Court [R. 101], and in accordance with the expression of the highest court of the State of California.

In re Morgan, 86 Cal. App. 2d 217.

III.

Decisions of the Highest Court of the State on Matters of State Law Are Controlling.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleston v. Dwyer, 322 U. S. 232, 236;

Neblett v. Carpenter, 305 U. S. 297, 302.

Until such time as the case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then-controlling decision of the highest state court.

Vanderbach v. Owens-Illinois Glass Co., 311 U. S. 538, 543.

It is submitted that the decision of the District Court of Appeal of the State of California in the matter of *In re Thomas B. Morgan*, 86 Cal. App. 2d 217 [R. 5] (Petition for Writ of Habeas Corpus denied without hearing in California Supreme Court [R. 4]), is controlling upon this court as to all matters passed upon therein and as are applied to the laws of the State of California, including the validity of Section 1549.1 of the California Penal Code, the sufficiency of the papers submitted to the Governor of California, and the sufficiency of the showing that petitioner was subject to prosecution in the State of Colorado.

IV.

The Warrant Issued by the Governor of California Is Legally Sufficient.

The true test of a warrant of extradition is not in its form, but in the right to issue such a document for the return of a person accused of crime. The authorities hereinbefore cited affirmatively establish that right in this case.

It has been held that the warrant issued by the Governor of an asylum state is *prima facie* evidence of the existence of every fact which that executive was obligated to determine before issuing it.

> *Ex parte Noble,* 198 S. W. 2d 893 (Tex. Cr. App.).

Where an extradition warrant recited an erroneous date of the alleged crime, there being undisputed evidence of the correct date of its commission, it was held not sufficient to require a discharge on habeas corpus.

> *Ex rel. Jackson v. Meyerling,* 54 F. 2d 621; cert. denied, 286 U. S. 542.

It has been stated that, where an extradition warrant showed that the demand of the governor of the demanding state was accompanied by copy of a complaint, warrant, affidavits and certificates, the executive warrant was sufficient as against the contention that the warrant did not recite what proof was offered to the issuing governor on which he based the extradition warrant.

> *Ex parte Cupp,* 84 S. W. 2d 731, 129 Tex. Cr. R. 25.

It is submitted that the portion of the first paragraph of said warrant [R. 44-45], which recites "and that he has fled from justice of that State, and has taken refuge in the State of California," is surplusage and should not affect its validity. The provisions of Section 1549.1, under which this warrant was issued, require a demand of the executive authority of another state for the surrender of a person in this state charged in such other state with committing an act in this state intentionally resulting in a crime in the state whose executive authority is making the demand. The warrant so issued includes the required findings of said section, and the record discloses that the surplus matter was in fact erroneously placed therein, being contrary to the evidence. If this portion were stricken, the warrant would still be sufficient to comply with the requirements of said Section 1549.1 of the California Penal Code.

The same is true of the language of paragraph two of said warrant, "Certified by the Governor of California" [R. 45]. Clearly the record shows that the papers submitted were certified by the Governor of Colorado [R. 49] and not by the Governor of California. That further portion of paragraph two, "and that said Tom Morgan is a fugitive from justice of the aforesaid State," appears to be surplusage and contrary to the facts, as are the words, "from which he fled," in the third paragraph. The warrant appears to be a regular form used, and includes language of the federal statute which respondent submits is not applicable to the present case and should not invalidate the authority and effect of a warrant to extradite under Section 1549.1 of the California Penal Code.

V.

Petitioner Is Subject to Prosecution Under Colorado Statutes.

The petitioner is charged with the crime of conspiracy to commit grand larceny, a felony under the laws of the State of Colorado. Section 177 of Chapter 48, Statutes of 1935, provides as follows:

> "If any two or more persons shall conspire to agree, falsely and maliciously, to charge or indict, or be informed against, or cause to procure to be charged or indicted or informed against any person for any criminal offense, or shall agree, conspire or cooperate to do, or to aid in doing any other unlawful act, each of the persons so offending shall upon conviction, in case of a conspiracy to commit a felony, be confined in the penitentiary for a period of not less than one year, nor more than ten years, and in the case of a conspiracy to commit a misdemeanor, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both such fine and imprisonment."

Under the laws of the State of Colorado, an accessory is deemed to be a principal.

> "An accessory is he or she who stands by and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be

deemed and considered as principal and punished accordingly . . ."

Section 13, Chapter 48, Stats. of 1935.

The courts of Colorado have held that an accessory may therefore be charged as a principal.

Mulligan v. People, 68 Colo. 17.

In *Newton v. People,* 60 Colo. 246, the defendant was charged with the crime of larceny of a steer. The facts showed that the defendant, Mrs. Newton, was never in Colorado in connection with the theft, but was at all times in New Mexico. The court stated:

"Had this crime been committed in one county in Colorado, and advised and encouraged in an adjoining county in the same state, it would scarcely be contended that the omission of the allegation of that diversity would be fatal to the information. If not, we fail to see the logic of the position that a different rule applies if the counties are in different states. The identical question has been decided under an almost identical statute. State of Nevada v. Chapman, 6 Nev. 320.

"There the accessory, who never left the state of California, was charged, tried and convicted of a train robbery in Nevada. His position was similar to that of Mrs. Newton here. The Supreme Court of Nevada held against him. We think its reasoning sound and its conclusion correct, and note no material distinction in the issues."

In the case of *Updike v. People,* 92 Colo. 125, the court therein also stated that one may perpetrate an offense against a state or county upon whose soil he never touched foot.

It is a well recognized principle in the law that, in order to charge one as an aider and abetter, or conspirator in crime, it is not necessary to establish his presence at the scene of the crime. Constructive presence is sufficient.

English v. Matowitz, 72 N. E. 2d 898;

Commonwealth v. Hollister, 157 Pa. 13;

Hyde v. U. S., 225 U. S. 347;

State of Kansas v. Wolkon, 110 Kan. 722.

It is therefore submitted that the crime with which the petitioner is charged was actually committed against the State of Colorado, and that the courts of that state have jurisdiction to prosecute him therefor, to the same extent as if he were personally present at the time of the actual commission of the consummated offense of larceny.

VI.
Conclusion.

The petition for writ of certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the Circuit Court of Appeals has decided a federal question in conflict with applicable decisions of this court. There appears in this case no reason, either in law or in good conscience, why the petition should be granted.

The respondent respectfully prays that the petition be denied.

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